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COURT OF APPEAL, FOURTH APPELLATE DISTRICT  
DIVISION ONE

STATE OF CALIFORNIA

S.C.,

Petitioner,

v.

THE SUPERIOR COURT OF SAN  
DIEGO COUNTY,

Respondent;

S.S.,

Real Party in Interest.

D062944

(San Diego County  
Super. Ct. No. D507537)

PROCEEDINGS in mandate after the superior court vacated a restraining order and allowed visitation with father. William H. McAdams, Judge. Petition granted.

**PROCEDURAL AND FACTUAL BACKGROUND**

S.C. (mother) and S.S. (father) were married in 2001, separated in 2007 and have two children, Cameron (presently nine years old) and Claire (presently six). The parents shared custody of the children (with the mother as primary caregiver) based on a weekly parenting plan until January 2012 when, after visiting his father, Cameron returned to his

mother's home with a bruise in the shape of a handprint on his face and a cut on his lip. Cameron told his mother his father had backhanded him and had also hit him on other occasions. Cameron also reported that his father had taken a bath with Claire, inappropriately touched her, and bathed in the nude with Claire on other occasions.

The mother appeared *ex parte* on January 26, 2012, and obtained a partial restraining order prohibiting the father from having contact with her or the children. The hearing on the restraining order was continued—and the restraining order reissued—a number of times.

On October 26<sup>1</sup> when the parties ultimately appeared for a contested hearing on the restraining order, the mother requested that the order remain in place—and there be no visitation—pending further evaluation to determine if the father were able to sufficiently control his impulses to avoid frightening Cameron. Both the mother and Cameron's treating psychologist testified, and were cross-examined. Although the mother's attorney had subpoenaed Larry Corrigan (the therapist who performed a psychosexual evaluation on the father) for the October 26 hearing, Corrigan did not appear. The court adjourned and ordered the parties to return on November 5 for a brief appearance to select a date for the resumed testimony of Corrigan and other witnesses and for the court to issue temporary orders.

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<sup>1</sup> In the interim between January 26 and the October 26 hearing, there was a referral to the District Attorney's Office, Family Court Services prepared for an informational report and conducted a pre-Order to Show Cause conference, and a psychosexual evaluation dated September 21 was completed on the father.

On November 5, the court continued the resumed hearing on the restraining order to January 9, 2013. The court also vacated the restraining order as to the children<sup>2</sup> and issued an immediate "temporary" order giving the father physical custody of the children on alternating weekends beginning November 9, 2012, with visitation to be informally supervised by the maternal grandparents. In response to objections by S.C.'s counsel that she was unable to appreciate what was going on without seeing the order, and she had not had a chance to finish putting on her case or argue, the court acknowledged her theoretical entitlement to a restraining order after further hearing but found "no harm to the children at this point in time" based upon the information before it. The court also denied S.C.'s request to fashion a modified restraining order to, for example, protect Cameron from S.S. appearing unannounced at school or other locations, saying that "I would certainly hope that visitation is conducted in an orderly fashion . . . [but the father] has not seen the children [in] a long time . . . [and] [h]e is now going to begin to see the children."

In this petition, the mother asserts the court improperly issued an order mid-trial without notice and contrary to the recommendations of the January 2, 2012, psychological custody evaluation, the recommendations of Family Court Services, and the September 21 psychosexual evaluation. We issued a stay, requested a response, and issued *Palma* notice. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178.)

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<sup>2</sup> The clerk indicated at the hearing that the court had vacated the restraining order as to the mother in May.

## DISCUSSION

The starting point in this analysis is litigants have a fundamental right to complete the presentation of their case-in-chief before the court renders a decision. (*In re Marriage of Carlsson* (2008) 163 Cal.App.4th 281, 291-292 [violation of husband's due process right to fair hearing to end trial while husband was still presenting his case-in-chief].) The press of business may weigh heavily on the family court, and the court should be lauded for its efforts to expedite the cases but, as the Supreme Court stated, "[S]uch efforts should never be directed in such manner as to prevent a full and fair opportunity to the parties to *present all competent, relevant, and material evidence* bearing upon any issue properly presented for determination. [¶] Matters of domestic relations are of the utmost importance to the parties involved and also to the people of the State of California. ... To this end a trial judge should not determine any issue that is presented for his consideration until he has heard all competent, material, and relevant evidence the parties desire to introduce.' " (*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1357-1358, quoting *Shippey v. Shippey* (1943) 58 Cal.App.2d 174, 177.) Here, the court improperly issued an order vacating the restraining order and allowing visitation with the father before the mother had completed her case-in-chief, despite acknowledging that the mother had a "justifiable" need to examine Corrigan and continuing the hearing expressly for that purpose.

Second, although it has authority to grant a nonsuit or judgment on the pleadings without hearing all the evidence and on its own motion (see Code Civ. Proc., § 438, subd. (b)(2)), the court abuses its discretion and violates due process if it acts without warning

and without affording the party an opportunity for argument or amendment. (6 Witkin, Cal. Procedure (5th ed. 2008), Proceedings Without Trial, § 186, p. 624.) To the extent the court granted something akin to judgment for the father based, as it said, "upon the information that now I have," it improperly did so without (1) giving notice that the restraining order in place for the last 10 months was about to be summarily vacated, (2) providing counsel a copy of the written order to review or (3) hearing any argument—even on the request for a modified restraining order.

Finally, there is no dispute in the record that Cameron suffers from moderate to extreme attention deficit disorder combined with hyperactivity. The therapist testified that

- Cameron began experiencing intense anxiety and became "very frightened if not virtually terrified" after the incident with his father,
- Cameron currently suffers from generalized anxiety to the point of paranoia, elements of post traumatic stress disorder, and obsessive compulsive behavior fueled by his anxiety, and
- although Cameron has improved with treatment, he would regress if the restraining order were lifted and if he were exposed to a more stressful unpredictable environment and/or anger and feels threatened again.

The un rebutted testimony is that, at a minimum, Cameron must be prepared—i.e., he must be consulted to see if he is ready to see his father and, if so, what he feels he would need not to be frightened—before visitation begins. Under these circumstances, the order granting the father immediate visitation is not supported by substantial evidence.

Because the facts are not in dispute, the law is well-settled, and the matter requires accelerated review, we conclude a peremptory writ in the first instance is proper. (Code of Civ. Proc., § 1088; *Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1222-1223, disapproved on another ground in *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 724, fn. 4; *Ng v. Superior Court* (1992) 4 Cal.4th 29, 35.)

#### DISPOSITION

Let a writ of mandate issue directing the superior court to set aside its November 5, 2012, order vacating the restraining order and allowing visitation and enter an order prohibiting visitation with the father until completion of the hearing. The mother is entitled to costs in the writ proceeding. (Cal. Rules of Court, rule 8.493(a)(1)(A).) This opinion is made final immediately as to this court. (Cal. Rules of Court, rule 8.490(b)(3).) The stay issued by this court on November 9, 2012, is vacated.

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BENKE, Acting P. J.

WE CONCUR:

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AARON, J.

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O'ROURKE, J.